IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 463 of 1990

1. Vinayak Neelkant Kale
2. Sou. Shaila Vinayak Kale ...Appellants

V/s

1. Shantabai Dattatraya Deshpande
since deceased
2. Arvind Dattatraya Deshpande ..Respondents

Shri A.A.Kumbhakoni for Appellants

Mrs B.P.Jakhade for Respondents

CORAM:S.R.SATHE,J.

DATED:5th August 2004

ORAL JUDGMENT :-

1. Being aggrieved by the judgment and order passed by the 8th Additional District Judge, Pune in Civil Appeal No.291 of 1987 whereby the order passed by the Court of 6th Joint Civil Judge,J.D., Pune in Regular Civil Suit NO.10 of 1990 directing the defendants to hand over possession of the suit property to the plaintiff was confirmed and the appeal was dismissed, the defendants have preferred this second appeal.

For the sake of convenience hereafter the parties shall be referred to as plaintiffs and defendants.

2. Brief facts giving rise to this appeal are as under :-

. House NO.1823 Sadashiv Peth, Pune is owned by plaintiff no.1. Plaintiff no.2 is the son of plaintiff no.1 and he used to manage the suit property. On 1-5-1977 one room out of the suit house was given to the defendant no.1 as a licensee as he was related to plaintiff. According to plaintiffs the defendant had promised to vacate the said room at the time of Datta Jayanti Shake 1901. At the relevant time the plaintiffs asked the defendant to hand over the possession of the suit room. However, he failed to do so and on the contrary tried to claim tenancy right under the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947 (hereinafter referred to as Bombay Rent Act). The plaintiff therefore filed Regular Civil Suit No. 10 of 1980 against the defendant and claimed the possession alleging that the defendant are gratuitous licensees and their license has been validly terminated.

. The defendants filed their written statement

and contended that the said room was in fact leased out by the plaintiff to the defendants family long back in the year 1970 at the monthly rent of Rs.25/- and the defendants have even accordingly paid the rent and deposit of Rs.5,000/-. They also denied plaintiff's allegation that suit room was given to them as a licensee and contended that even if it is assumed for the sake of argument that the suit room was given as licensee still the case of the plaintiff that they were gratuitous licensee is not true and correct. They further contended that having regard to the provisions of Section 15A of Bombay Rent Act the defendant no.1has become tenant and as such he is protected. Hence on these grounds the defendants prayed for the dismissal of the suit.

3. On these pleadings, the learned trial Judge framed necessary issues and after considering the evidence adduced by both the parties the learned trial Court came to the conclusion that the suit is barred by provisions of res judicata as in the earlier proceedings between the same parties Small Cause Court , Pune had held that defendant no.1 is not tenant. He also held that the plaintiff has proved that the suit room is given to the defendant as a gratuitous licensee. He therefore decreed the plaintiff's suit for

possession.

4. Being aggrieved by the said judgment and order the defendants filed Civil Appeal No.291 of 1987. After hearing the arguments of both the learned Advocates the first appellate court also held that the suit room was given to the defendant no.1 as a gratuitous licensee by the plaintiffs and defendant no.1 is not a tenant under Section 15A of Bombay Rent Act. He therefore dismissed the appeal and confirmed the decree passed by the trial Court.

5. Being aggrieved by the same the defendants have filed this second appeal.

6. The only substantial question of law involved in this appeal is whether the order passed by the appellate court holding that defendant is not a tenant but a gratuitous licence is a legal and correct.

7. Mr.Kumbhakoni, learned Advocate for the Appellant has urged only two points. Firstly he submitted that the learned trial Court had in fact not at all appreciated the evidence on record and wrongly decided the suit merely by holding that the suit is barred by principle of res judicata. Secondly he canvassed before me

that the first appellate Court should have noticed that lower Court did not take into consideration the evidence and failed to record a finding of fact and as such the matter ought to have been remanded to the trial Court. Instead of doing so, the first appellate Court without considering the entire evidence on record wrongly held that defendant no.1 is a gratuitous licensee and not a tenant. He therefore submitted that second appeal be allowed and matter be remanded back for fresh trial. As against this the learned advocate for the plaintiff supported the judgment and order passed by the first appellate court and also submitted that issue with regard to the tenancy was in fact considered by the Small Causes court previously, in earlier litigation between the parties and at that time it was held that the defendant is not a tenant. The defendant did not challenge the said finding and as such the same is binding on the defendant.

8. At the outset it must be mentioned that scope of second appeal is very limited. There is no necessity to look into the entire evidence and reappreciate the same particularly when it appears that there is a concurrent finding of fact wherein it has been held that the defendant no.1.is not a tenant. From the perusal of the

record and in particular the judgment of the trial court it appears that defendant had in fact produced several documents to show that the suit room was given to defendants family some time in the year 1970 and thereafter possession of the same was never given back to the plaintiff. All along there was an attempt to show that plaintiffs theory that the suit room has been given to defendant in the year 1977 or thereabout is incorrect. Shri Kumbhakoni, learned advocate for the defendant urged before me that the trial Court has only mentioned in the judgment as to what evidence was adduced by the parties. However, the trial Court did not record its own finding with regard to the said evidence and decided the matter only on the point of res judicata. From the perusal of the said judgment it appears that trial Court has given in detail the entire evidence adduced by the parties and observed that having regard to this evidence the District Judge in C.R.No.60 of 1983 held that the defendant is not a tenant. Thus it appears that the learned trial Court has not specifically observed that after assessing the said evidence independently it appears that the defendant has failed to prove that he is a tenant. However, the question arises whether merely because the learned trial Court has not scanned the evidence in such manner it can be

said that finding recorded by the first appellate court after considering the evidence on record is not legal and correct and that it is necessary to remand the matter, to trial court for assessing the evidence. From the perusal of the judgment of first appellate court it is clear that the first appellate court has taken into consideration all oral and documentary evidence produced by the parties and has decided the matter. So it is not at all necessary to remand the matter after 20 years. The first appellate court has considered Exh.103 in detail. The said document is a writing executed by Sudhakar Nilkanth Kale, defendant's brother. In this document Sudhakar Nilkanth Kale has specifically stated that he is residing in the suit room along with his family members and he is not paying rent for the same. Not only that but he has further stated in the writing that he is nephew of the landlord and as such with a view to accommodate them the suit room has been given to them. A feeble attempt has been made on behalf of the defendant to show that the contents of said writing are not correct. It is tried to suggest that the plaintiff landlord wanted some document to show to the Municipal Corporation that plaintiff is not charging any rent to the defendant and this was necessary so as to reduce the assessment of

the property hence this document was executed. It is true that there is evidence to show that this document was to be produced before the Corporation authority. But that does not necessarily mean that contents of this document are not correct. Even if factually premises have been given to the defendant as gratuitous licensee still then the owner is required to establish the said fact before Corporation. So merely because such writing is given to produce before the Corporation authority, we cannot jump to the conclusion that contents of the document are not correct and true. As it is, due importance and weightage has to be given to this document Exh.103. In my opinion, this Exh.103 in fact gives death blow to the defendant's contention that the suit room was not taken as gratuitous licensee. No one would have given such writing against his own interest if really it would not have been a fact. So the learned first appellate court has rightly given importance to this document and held that the plaintiff has proved that defendant is a licensee while defendant has failed to prove that suit room was taken on lease. Admittedly the defendant had failed to produce any other documentary evidence to show that he was actually paying any amount to the plaintiffs for occupation of the suit room. We cannot ignore

the fact that admittedly the plaintiff and defendants are related with each other and defendant himself has in fact admitted that suit room has been given to him to accommodate their family.

9. The learned Advocate for the Appellant argued before me that as it was the case of the plaintiffs that the plaintiff no.1 gave the premises to the defendant by way of gratuitous licensee and it was oral transaction it was necessary for the plaintiff to examine plaintiff no.1. However, as she has not been examined adverse inference can be drawn. However, from the perusal of the plaint it is crystal clear that it was specifically averred that plaintiff nos.1 and 2 had given the suit premises to the defendant no.1 as a gratuitous licensee and plaintiff no.2 was managing the property. Under such circumstances non examination of the plaintiff no.1 is not fatal to the case of the plaintiff. Hence I am not inclined to accept the argument advanced by the learned Advocate for the Appellant in this behalf.

10. It is an admitted fact that at one point of time there was some dispute between plaintiff and defendant with regard to electricity connection in the suit premises, and the

defendant had filed an application No.508 of 1980 for restoration of the electric supply in the suit room. At that time plaintiff had raised the contention that such application is not maintainable in the Small Causes Court as defendant is not a tenant. Naturally the Small Causes Court was required to give finding as to whether the defendant is a tenant or not. And in that proceedings it was held that defendant is not a tenant. The District Court had also in Civil Revision Application observed accordingly and this finding have not been challenged by the defendant. So the said findings are binding on the defendant and due weightage shall have to be given to the same. It is true that the trial Court had observed that present suit is barred by principle of res judicata but the first appellate Court held that provisions of Section 11 of C.P.C. cannot be made applicable to the present suit. Even taking into consideration the facts of the present suit and the facts of the earlier proceedings filed before the Small Causes Court it can be said that the present suit is not barred by principle of res judicata. However, we cannot ignore the fact that in order to determine the application filed by the defendant with regard to the restoration of the electricity supply it was absolutely necessary for the Small Causes court first to determine

whether the applicant viz. defendant in the present suit is a tenant or not. So, considering the said aspect, it has to be held that said issue was very material and substantial issue in the said proceeding and the same was answered against the defendant in the said proceeding.

11. In view of above I have no hesitation to hold that the first appellate court after considering the entire evidence on record has rightly come to the conclusion that the plaintiff has proved that defendant is residing in the suit premises as a gratuitous licensee and the defendant has failed to prove that he has become tenant. In this view of the matter the finding recorded by the first appellate court appears to be legal and correct and there is no need to interfere with it. Thus there is no substance in this appeal and the same is dismissed with costs.

(S.R.SATHE,J.)

9th August 2004.

. The learned Advocate for the Appellant has submitted that the appellant intends to file an appeal in the Apex Court and as such the order passed by this Court in Second Appeal be stayed for 8 weeks.

. The learned Advocate for Respondent submitted that there is concurrent finding of both the courts below. Besides this initial decree for possession has been passed in the year 1986 and as such stay should not be granted.

. Having regard to the fact that about 18 years have already lapsed, I think that there is in fact no sufficient reason to grant stay as prayed for. Hence the said prayer is rejected.

. However, considering the fact that the suit premises is residential one, time is granted to vacate the suit premises till 10-9-2004.

(S.R.SATHE,J.)